IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

MONDAY, THE 19TH FEBRUARY, 2007 / 30TH MAGHA, 1928

CRL.A.No. 1219 of 2001

(SC.94/2001 of SPECIAL COURT (NDPS ACT CASES), VADAKARA)

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APPELLANT/ACCUSED:

OUSEPPACHAN,
S/O.THOMAS,
KAPPIARUKUNNEL HOUSE,
MELEKANDIYUR, THAVALAM.P.O.,
ATTAPPADI, PALAKKAD.

BY ADV. SRI.P.VIJAYA BHANU
SRI.P.M.RAFIQ

RESPONDENT/COMPLAINANT:

STATE OF KERALA, REPRESENTED
BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM,
REPRESENTING THE C.I.OF POLICE,
SULTHAN BATHERY.

BY PUBLIC PROSECUTOR SRI.S.DILEEP.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 19/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.THANKAPPAN, J.

Crl.Appeal NO.1219 OF 2001

Dated this the 19th day of February, 2007

J U D G M E N T

The appellant, the accused in Sessions Case No.94/2001 on the file of the Special Judge (N.D.P.S.Act Cases), Vadakara faced trial for an offence punishable under Section 20(b)(i) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the N.D.P.S.Act'). The prosecution case against the appellant was that he was found in possession of 975 grams of ganja on 20.12.2000 at about 2.10 pm at Karakkandy Road Junction in violation of the provisions of the N.D.P.S.Act along with another accused. On getting the above information, the Sub Inspector of Police, Sulthan Bathery Police Station along with other Police officials reached the spot and on questioning the appellant and the other accused, it was found that the appellant was in possession of a plastic cover in his hand and on issuing Ext.P2 Notice to the accused and on preparing Ext.P3

seizure Mahazar, the contraband article was seized from the possession of the appellant. Thereafter, he was arrested and produced before the court along with the seized contraband article and samples taken therefrom. To prove the above case against the appellant, the prosecution examined Pws 1 to 3 and relied on Exts.P1 to P10. Mos 1 to 6 were also produced. On the side of the defence, DWs 1 and 2 were examined. On closing the prosecution evidence, the appellant was questioned under Section 313 of the Code of Criminal Procedure. Denying the allegations, the appellant had stated that a case was foisted against him by the Police and he was innocent. He had further stated that no contraband article was seized from him whereas the contraband article produced had been seized from the co-accused. Further, relying on the prosecution evidence, the trial court found the appellant guilty under Section 20(b)(i) of the N.D.P.S.Act, convicted and sentenced him to undergo rigorous imprisonment for two years and to pay a fine of

Rs.5000/- and in default of payment of fine, to undergo simple imprisonment for a further period of six months. Set off under Section 428 of the Code of Criminal Procedure was also allowed. Against the conviction and sentence ordered, this appeal has been filed.

2. This court heard learned counsel appearing for the appellant as well as the learned Public Prosecutor. Counsel appearing for the appellant had taken three contentions before this Court; (i) the trial court went wrong in finding the appellant guilty of the charge relying only on the evidence of the Police Officials as there was no independent evidence to support the prosecution case. (ii) PW1, the Sub Inspector of Police had not complied with the provisions of the N.D.P.S.Act while detecting the crime and seizing the contraband article and (iii) even if the entire prosecution evidence is believed, the appellant cannot be found guilty under Section 20(b)(i) of the N.D.P.S.Act as the quantity of the contraband article alleged to have been seized is below

thousand grams.

3. PW1 is the Sub Inspector of Police of Sulthan Bathery Police Station who had stated before the court below that he had received information that the appellant and one shoe-maker Ashokan were going towards the Karakkandy Road Junction and they were having ganja in their possession. On getting the information, PW1 and other Police Officials reached the junction and found the appellant as well as Ashokan and the appellant was found carrying a plastic bag in his hand and on further scrutiny, it was found that the plastic bag contained 975 grams of ganja wrapped in a paper. Thereupon, PW1 told the appellant and the other accused that their body had to be searched and asked them whether they required the presence of a Gazetted Officer. Immediately, PW3, the Circle Inspector of Police was brought to the scene and the body of the appellant and the other accused were searched. MO6 plastic cover was recovered in which the appellant kept 975 grams of

ganja. This witness had further stated that out of the contraband articles seized from the appellant, samples of 25 grams of ganja were taken for the purpose of analysis. This witness had further stated that the samples and other material objects seized from the appellant were produced before the court on the next day of registering the crime against the appellant. This witness had further stated that when the contraband article was seized, PW2, an independent witness was also present at the scene, who had watched the actions of PW1. The evidence of this witness was supported by PW2. PW2 was an independent witness who supported the prosecution case as such and had given evidence before the court below that on the date of the incident, he was present at the time when PW1 had seized the contraband article from the possession of the appellant. This witness also had stated that he had signed Ext.P3 seizure Mahazar. At the time of the seizure, PW3, the Circle Inspector of Police was also present. Evidences of

these two witnesses have been supported by PW3. PW3 had stated that he had received an information from the Sub Inspector of Police that the appellant and Ashokan were in possession of ganja. This witness had further stated that he was present at the time when the contraband article was seized from the appellant. He also had stated that in his presence, the body of the appellant was searched by PW1. He also stated that the sample of the contraband article seized from the appellant when analysed was found to be ganja. Accepting the above evidence, the trial court found that the prosecution succeeded in proving the case against the appellant that he was found in possession of 975 grams of ganja in MO6 plastic bag.

4. The question to be analysed in this appeal is whether the evidence of these witnesses would be relevant. The prosecution placed reliance on the evidence of Pws.1 to 3, out of whom PW2 is an independent witness, who had supported the prosecution

case. Hence, on a reading of the entire evidence, this Court is of the view that the trial court was fully justified in accepting the prosecution case. The next question to be considered in this case is whether the conviction ordered against the appellant under Section 20(b)(i) is sustainable or not. In this context, learned counsel for the appellant submits that in the light of the notification issued under the N.D.P.S.Act as S.O.1055(E) dated 19.10.2001, the offence committed by the appellant can be only under Section 20(a) of the N.D.P.S.Act as the quantity of the contraband article is less than thousand grams. In this context, it is to be noted that though the offence had been detected prior to the publication of the above notification, during the commencement of this notification, the case was pending before the trial court and if so, whether the benefit of this notification can be applied to the appellant. To substantiate this point, counsel for the appellant brought to the notice of this Court a judgment of the Apex Court reported in **Basheer**

v. **State of Kerala** (2004(3) SCC 609). In the above judgment, the Apex Court considered the amendment brought to the N.D.P.S.Act, 1985 by Act 9 of 2001 and also applicability of notification dated 19.10.2001 and the Apex Court held that the benefit of the notification with regard to the quantity of the contraband article could be applied to a case which was pending before the court during the commencement of the notification. The Apex Court after dealing the provisions of Section 41 with regard to the pending cases held as follows:-

> "7. By this section, Parliament has declared its intention to apply the amended provisions of the Act to: (a) all cases pending before the court on 2-10-2001; (b) all cases under investigation as on that date; and provides that these categories of cases shall be disposed of in accordance with the provisions of the 1985 Act as amended by the Act of 2001. In other words, the benefit of the rationalised sentencing structure would

> be applicable to these categories. The proviso, however, makes an exception and excludes the application of the rationalised sentencing structure to cases pending in appeal."

In the light of the above ruling of the Apex Court, this Court is of the view that the appellant can be found guilty only under Section 20(a) of the N.D.P.S.Act and not under Section 20(b)(i) of the Act. Hence, the conviction and sentence of rigorous imprisonment and fine ordered against the appellant under Section 20(b)(i) are set aside and instead, the appellant is found guilty under Section 20(a) of the Act. In the matter of imposition of sentence, this Court finds that the appellant was below the age of 20 years at the time of the commission of offence and the quantity was also small. In the above circumstances, this Court is of the view that Simple Imprisonment for 3 months will meet the ends of justice.

5. Accordingly, the appellant is sentenced to undergo Simple Imprisonment for 3 months and to pay a fine of Rs.1,00,000/- (rupees one lakh only) and in default of payment of fine, the appellant shall undergo Simple Imprisonment for a further period of one month.

6. It is reported that the appellant has already undergone imprisonment for more than four months. Hence, the imprisonment is limited to the period already undergone. The petitioner was released on bail by this Court on 20.12.2001. Accordingly, the bail bond stands cancelled.

The appeal is allowed partly.

K.THANKAPPAN,
JUDGE

Mbs/

K.THANKAPPAN, J

Crl.Appeal NO.1219 OF 2001

J U D G M E N T

DATED:19-02-2007